
IN THE
²
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN KOPPITZ,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3604

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, THIRD DIVISION.

Brief for Plaintiff in Error

B. O. GRAHAM, Cordova, Alaska,
EDWARD F. SMEDLEY, Cordova, Alaska,
E. E. RITCHIE, Valdez, Alaska,
Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN KOPPITZ,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

No. 3604

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, THIRD DIVISION.

Brief for Plaintiff in Error

STATEMENT OF THE CASE.

Plaintiff in error was convicted in justice's court of a misdemeanor. He appealed to the district court and there on motion of the district attorney his appeal was dismissed upon the ground

that his notice of appeal was defective, and judgment was entered against him as in the lower court. From that judgment of the district court he prosecutes this writ of error. The complaint filed against him in justice's court reads as follows:

"John Koppitz is accused by William L. Fursman in this complaint of the crime of violating the Alaska Bone Dry Law, an Act entitled 'An Act to prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska and for other purposes,' committed as follows, to-wit:

The said John Koppitz, in the Territory of Alaska, and within the jurisdiction of this court, did, wilfully and unlawfully, on the 31st day of May, 1920, at Cordova, Alaska, be found drunk on the public streets, to-wit, in said town of Cordova, contrary to the form of statute in such case made and provided and against the peace and dignity of the United States of America." (R. 1-2.)

The judgment contained the following recital:

"The above-named defendant John Koppitz having been brought before me, R. H. L. Noaks, U. S. Commissioner and ex-officio justice of the peace, charged with violating the Alaska Bone Dry Law, and having pleaded NOT GUILTY to said charge, William L. Fursman and Geo. Stewart were each sworn and testified on behalf of plaintiff, and thereafter defendant having no evidence to offer and the court being fully advised in the law

and the premises and by the court found "GUILTY," and nothing appearing why sentence should not be pronounced, it is hereby adjudged for the crime aforesaid said defendant be sentenced to pay a fine of \$250 and the costs of the action taxed at \$25.05 or be imprisoned in the Federal jail not exceeding 125 days." (R. 9.)

The notice of appeal was addressed to the district attorney and private prosecutor by name and title, was served upon the private prosecutor, and further reads as follows:

"You will please take notice that John Koppitz, the above-named defendant, appeals from the decision and judgment given by Hon. R. H. L. Noaks, U. S. Commissioner and ex-officio Justice of the Peace for the Cordova Precinct, Third Division, Territory of Alaska, in the above-entitled action on June 2, 1920, said action for which said defendant was tried, on his plea of Not Guilty, by the court without a jury on June 2, 1920, being a criminal complaint signed by William L. Fursman, as private prosecutor, charging the said defendant with the crime of violating the 'Alaska Bone Dry Law,' which is an act entitled 'To prohibit the manufacture or sale of alcoholic liquors in the Territory of Alaska, and for other purposes,' enacted by the United States Congress and approved February 14, 1917, and that on said trial the said defendant was found guilty by the said U. S. Commissioner and ex-officio justice of the peace, and upon said conviction it was ordered and adjudged by the said U. S. Commissioner and ex-officio justice

of the peace that the said John Koppitz be fined the sum of Two Hundred and Fifty (\$250.00) Dollars, and costs of the action taxed at \$25.05, or be imprisoned in the Federal Jail not exceeding one hundred and twenty-five days." (R. 3.)

The district court dismissed the appeal on motion of the district attorney "on the grounds that said notice of appeal was void for the reason that the same did not describe and identify the judgment entered in said Commissioner's court, or describe with particularity the crime for which defendant was convicted." (R. 11.)

The judgment and order of the district court "further ordered that the judgment entered in the Commissioner's court for Cordova precinct be entered herein," and that defendant pay a fine of \$250 and be imprisoned one day for each \$2 of the fine that he might fail or refuse to pay. (R. 11.)

ASSIGNMENTS OF ERROR.

1. The Court erred in entering judgment of dismissal of defendant's appeal from the judgment of the Justice court.

2. The Court erred in entering judgment and sentence against defendant after dismissing defendant's appeal.

3. The Court erred in entering any judgment against defendant based upon the complaint in the action.

ARGUMENT.

I.

THE COURT ERRED IN DISMISSING DEFENDANT'S APPEAL.

It will be observed that the order and judgment of dismissal upon the ground that the notice of appeal failed to identify the judgment with particularity does not specify wherein the notice was defective. Inasmuch as the notice contains everything recited in the judgment except the names of the witnesses, and further recites "with particularity" sundry proceedings not specified in the judgment, counsel for plaintiff in error respectfully submit without further argument that the notice of appeal does fully identify the judgment and meets every requirement of a notice laid down in the Oregon decisions construing the statute of which the Alaska provision is a transcript, and is fully upheld by the rule laid down in *Neppach v. Jordan*, 10 P. 341:

"A judgment is sufficiently described when the court in which it is rendered is given, the

names of the parties to the judgment, the date of the judgment, and for what it was rendered."

II.

THE COURT ERRED IN ENTERING JUDGMENT AND SENTENCE AGAINST DEFENDANT AFTER DISMISSING THE APPEAL.

The judgment of dismissal states that "the notice of appeal is void." The case, therefore, was dismissed for want of jurisdiction. The defendant never came within the jurisdiction of the district court. How then could the court render any judgment against him? It is true that the judgment was based upon section 2559 Alaska Code (Carter's Code, sec. 450), which provides "That when an appeal is dismissed the appellate court must give judgment as it was given in the court below," but the Oregon supreme court has passed on the same provision in the Oregon Code five times and in each instance has held without assigning reasons that the appellate court has no power to act further than to dismiss. In *Whipple v. Southern Pacific R. Co.*, 55 P. 975, the court said:

"The circuit court properly dismissed the appeal, but, having proceeded further, and rendered judgment as in the justice court this was error. *Fassman v. Baumgartner*, 3 Or.

469; *Long v. Sharp*, 5 Or. 438; *State v. McKinnon*, 8 Or. 485; *Neppach v. Jordan*, 13 Or. 246, 10 P. 341. The judgment will therefore be reversed and the cause remanded with instructions to dismiss the appeal."

In *Cartier v. United States*, 148 F. 804-7, Judge De Haven, announcing the decision of this court on an Alaska appeal, cites the code section in question and says:

"The district court proceeded under the authority conferred by this section and gave the judgment now under review. The jurisdiction of the court to render such judgment was not challenged."

Intimating, it would seem, that such jurisdiction was wanting.

In all the Oregon cases the court seemed to consider the fundamental principle that no judgment can be rendered without jurisdiction so elementary as to require no argument beyond its naked suggestion. Counsel for plaintiff in error believe it superfluous to offer any argument on this question except these citations.

III.

THE COURT ERRED IN ENTERING ANY JUDGMENT AGAINST DEFENDANT BASED UPON THE COMPLAINT.

The Act of Congress of February 14, 1917, prohibiting the manufacture and sale of intoxicating liquors in Alaska, known as the "Alaska Bone Dry Law," provides in section 27 that it shall be the duty of all federal and municipal officials, naming each and every office, "to enforce the provisions of this act." Section 28 provides:

"Prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska."

The complaint in this case was signed and verified by a person described as "private prosecutor." Plaintiff in error submits that in the face of the requirement that prosecutions "shall" be on "information" filed by a designated officer an information or complaint filed by a private prosecutor is void. If it be argued that the Alaska Code makes provision for prosecution of misdemeanors on complaint filed by private prosecutors the answer is that the prohibition law is a special statute which makes specific provision for its enforcement, and under the rule that penal statutes must be strictly construed it follows that this special provision excludes any other method of prosecution. *Expression unius exclusio alterius.*

“Where a statute creates a new offense and at the same time prescribes a particular and limited remedy, all different or other remedies than those prescribed are to be deemed excluded.” *Pentlarge v. Kirby*, 19 F. 501.

It will be noted that the act provides only for prosecution by indictment or information. The latter term has a meaning as specific and well known as indictment. It is a written charge made by an authorized public officer, usually a prosecuting attorney. 1 *Bish. Crim. Proc.*, sec. 141. When a private person is authorized by law to prefer a criminal charge it is known as a complaint, never an information. If any person can file a complaint under the law why should it specify that numerous designated officers are charged with its enforcement and that prosecutions shall be on information by such officers or by indictment?

If it be insisted that “shall” in the section mentioned is to be construed “may,” such construction still leaves no escape from “information.” Is it to be assumed that Congress, containing many able lawyers, did not know the difference between an information and a complaint?

A reason easily suggests itself in support of the theory that Congress intended prosecutions under the prohibition act to be instituted and con-

ducted by public officials. Prohibitory liquor laws more easily than almost any other included in penal codes lend themselves to private spite and revenge. It is not unreasonable to suppose that Congress intended to confine its enforcement to official authority. This theory would seem to find substantial basis in the enumeration of all the holders of all the offices in the territory as persons specially required to enforce the law. Further, the offenses denounced by the act are in their nature offenses against the public. The misdemeanors which may be prosecuted under the general code on complaint of private prosecutors are largely those which are perpetrated against individuals, such as assault and battery, petty larceny and injuries to private property. In these the individual chiefly is aggrieved, the public only incidentally. Hence the injured person is given the right to prosecute.

Finally, in support of the third assignment of error—invalidity of the complaint—plaintiff in error urges that the Alaska Bone Dry Law was impliedly repealed by the Eighteenth Amendment and the Volstead act, effective in January, 1920. The offense was charged to have been committed May 31, 1920. While it is true that implied repeals are not favored it is generally true that a

later act covering practically every provision of an earlier one abrogates the prior act. The Alaska prohibition law was an act of Congress, which has plenary power over the territories. The Volstead law was enacted by Congress in pursuance of a new national policy. It was an exercise of the police power intended to be uniform and as far-reaching as the Constitution. It seems unreasonable to assume that because the Volstead act did not directly repeal the Alaska law Congress intended to leave the latter as a cumulative law in a single territory, giving that territory a prohibition policy and creed different from other territories and all the states.

The doctrine of implied repeal is discussed and decided in *United States v. Tynen*, 11 Wall. 88, and the principle as laid down there was subsequently approved by the supreme court in the *Paquete Habana*, 175 U. S. 677, and in numerous cases cited in the latter case. Also in *Murphy v. Utter*, 186 U. S. 95.

Plaintiff in error respectfully submits that the judgment of the district court should be reversed with an order that the complaint be dismissed.

B. O. GRAHAM,
EDWARD F. MEDLEY,
E. E. RITCHIE,
Attorneys for Plaintiff in Error

